Supreme Court, U.S.
FILED
OCT

No. 94 652

In the Supreme Court of the United States

OCTOBER TERM, 1994

FREEDOM RANCH, INC.,
Petitioner,

v.

BOARD OF ADJUSTMENT OF THE CITY OF TULSA, TWENTY-FIRST PROPERTIES, INC., CHARLENE CHANCELLOR, RADIO, INC., BALCOR PROPERTY MANAGEMENT, INC., DOWNTOWN TULSA, UNLIMITED, INC., AND GENEVIEVE ROGERS,
Respondents.

Petition for a Writ of Certiorari to the Oklahoma Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

N. KAY BRIDGER-RILEY*
LISA MICHELLE BOHANNAN
Bridger-Riley & Associates, P.C.
8908 South Yale Ave., Suite 230
Tulsa, Oklahoma 74137
(918) 494-6699

**Counsel of Record*

QUESTION PRESENTED

The City of Tulsa's zoning ordinance provided that property located in the Central Business District could be used as of right for various types of multi-person dwellings, including as a residential treatment center for recovering alcoholics or addicts, homeless shelter, hotel, fraternity house, nursing home, boarding house, and group home for mentally retarded individuals. The ordinance, however, designated "convict pre-release center" as a use permitted in the city limits only upon the grant of a special exception by the Board of Adjustment.

The question presented is whether, under the reasoning of this Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), Tulsa's invocation of the special exception requirement to bar petitioner from operating a halfway house for non-violent ex-offenders is irrational and therefore violates the Equal Protection Clause of the Fourteenth Amendment.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Freedom Ranch states that it has no parent corporation and no subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT 2

A. Background 3

B. The Decisions Below 7

REASONS FOR GRANTING THE PETITION 8

A. The Courts Of Appeals Are Divided Concerning The Application To Halfway Houses Of This Court's Analysis In *Cleburne* 9

B. Application Of The Permit Requirement To Close The Freedom Ranch Facility Violates The Equal Protection Clause 12

C. The Constitutionality Of Zoning Ordinances That Single Out Halfway Houses For A Permit Requirement Is A Recurring Legal Issue Of Considerable Practical Importance. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Pages**

Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989 (11th Cir. 1990) 10

Bannum, Inc. v. City of Louisville, 958 F.2d 1354 (6th Cir. 1992) 9, 10, 13

Bannum, Inc. v. City of St. Charles, 2 F.3d 267 (8th Cir. 1993) 11

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 2, 3, 8-14

Statutes

28 U.S.C. § 1257(a) 2

Tulsa, Ok. Rev. Ord. tit. 42 ch. 7 § 700(E) (1990) 4

Tulsa, Ok. Rev. Ord. tit. 42 ch. 16 § 1608.(C) 4

Miscellaneous

International Association of Residential and Community Alternatives, *Findings of National Research* (Nov. 1993) 15

International Association of Residential and Community Alternatives, *Synopsis of Statement Before the United States Sentencing Commission* (Mar. 15, 1993) 14

National Committee on Community Corrections, *A Proposal for Action* 3 (1993) 15

In the Supreme Court of the United States

OCTOBER TERM, 1994

FREEDOM RANCH, INC.,
Petitioner,

v.

BOARD OF ADJUSTMENT OF THE CITY OF TULSA
TWENTY-FIRST PROPERTIES, INC., CHARLENE
CHANCELLOR, RADIO, INC., BALCOR PROPERTY
MANAGEMENT, INC., DOWNTOWN TULSA,
UNLIMITED, INC., AND GENEVIEVE ROGERS,
Respondents.

Petition for a Writ of Certiorari to the Oklahoma Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

Freedom Ranch, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Oklahoma Court of Appeals in this case.

OPINIONS BELOW

The order of the Supreme Court of the State of Oklahoma denying the petition for a writ of certiorari (App., *infra*, 1a) is unreported. The opinion of the Oklahoma Court of

Appeals (App., *infra*, 2a-8a) is reported at 878 P.2d 380 (Okla. App. 1994). The opinion of the district court (App., *infra*, 9a-21a) is unreported. The determination of the Board of Adjustment of the City of Tulsa (App., *infra*, 22a-24a) is unreported.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma denying the petition for a writ of certiorari (App., *infra*, 1a) was entered on July 13, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The provisions of the City of Tulsa zoning code applicable to this case are reproduced at pages 25a-26a of the appendix to this petition.

STATEMENT

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) this Court held invalid under the Equal Protection Clause of the Fourteenth Amendment a zoning ordinance that required a special use permit for homes for the mentally retarded even though other care and multiple-dwelling facilities were allowed as a right. The Tulsa ordinance at issue here, which singles out halfway houses for nonviolent offenders for an identical permit requirement, is indistinguishable from the discriminatory zoning ordinance declared unconstitutional in *Cleburne*. In the case at hand, however, the City of Tulsa has gone so far as to extend the requirement for a special exception to **all zoning districts within the city limits**. The City of Tulsa zoning code discriminates solely on the basis of negative attitudes and fear of these ex-offenders. These attitudes and fears are, as they were in *Cleburne*, unsubstantiated by factors that are properly cognizable in a zoning code.

In upholding the denial of the permit, the trial court made specific findings of fact and law that made no mention of decreased property values, increased danger to the neighbors or any basis relating to the health safety and welfare of the public. Rather, the court stated simply that the granting of the permit would frustrate the City's Comprehensive Plan. The overwhelming evidence at trial showed no increased danger and no detrimental effect on the property values — the only issues rationally related to a legitimate state purpose, or as the *Cleburne* court put it, "properly cognizable in a zoning proceeding" (473 U.S. at 448). All of the City's witnesses who addressed the Comprehensive Plan stated that the only reason the requested use was not in harmony with the Comprehensive Plan was because Freedom Ranch housed "convicts".

Amazingly, the state court of appeals, with full knowledge of the *Cleburne* case and of a Sixth Circuit decision invoking *Cleburne* to invalidate a permit requirement applicable to halfway houses, held that the "orderly development of the Tulsa Central Business District in accordance with the provisions of the Comprehensive Plan" (App., *infra*, 5a) was a legitimate basis for denial of Freedom Ranch's application. This Court should grant the petition for a writ of certiorari in order to resolve the conflict and correct the erroneous interpretation of the rational basis test applied in this case.

A. Background

1. The zoning ordinance of the City of Tulsa specifically allowed, in the words of the court below, "'intense use'" of the property [within the Central Business District] for commercial, multi-family or office use." (App., *infra*, 3a). In particular, the ordinance states that:

> The purposes of Central Business District (CBD) are to:

> 1. Accommodate and encourage the most desirable, most productive, *most intense use of the land*, without regard to regulation of building height, floor area, land coverage or parking space requirements, within the central core area of the city designated by the Comprehensive Plan.
>
> 2. *Encourage a diversity of high intensity uses which mutually benefit from close proximity to, and from available services* of, the high transportation carrying capacity afforded by the Inner Dispersal Loop.
>
> 3. Preserve and promote the public and private investment of the existing core area.

Tulsa, Ok. Rev. Ord. tit. 42 ch. 7 § 700(E) (1990) (emphasis added).

A "convict pre-release center," on the other hand, is permitted to operate only upon the grant of a special exception by the City's Board of Adjustment. Tulsa Ok. Rev. Ord., *supra* at § 1202.[1] Under the ordinance, the Board must hold a hearing on applications for special

---

[1] In August 1994, the City of Tulsa amended its zoning ordinance to reduce the number of multi-person residential uses permissible as of right in the Central Business District. For example, homeless shelters and group homes for recovering addicts in addition to several other uses formerly in Use Unit 5 (App. 27a-28a) may not operate without obtaining a special exception from the Board of Adjustment.

This amendment does not affect the controversy in this case because the new ordinance does not apply to pre-existing permissible uses. Accordingly, if Freedom Ranch should have been allowed to operate without obtaining a special exception in 1987, when it first began operations, or in 1991 when the Board refused to grant a special exception, its use would be permissible under the "grandfather" clause for nonconforming uses in the new zoning ordinance. Zoning Code § 1402.

exceptions, *id.* at § 1603, and grant the application if the applicant shows that the requested use will be "in harmony with the spirit and intent of the code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare." Tulsa, Ok. Rev. Ord. tit. 42 ch. 16 § 1608.(C). However, the City's witness, Mr. Robert Gardner, who heads the entity which reviews all applications for Special Exceptions, testified that the Board of Adjustment has *never approved any application* for a special exception for a convict pre-release center. IV Tr. 181.

2. Petitioner Freedom Ranch, Inc., is a non-profit corporation that operates halfway houses under contracts with the Oklahoma Department of Corrections, the Federal Bureau of Prisons, U.S. Probation Office and the Oklahoma Department of Mental Health. Freedom Ranch's program is open to persons convicted of non-violent crimes[2] who have been given community security clearance status by prison officials and are within approximately ninety days of their release from custody. It provides employment training, counseling, family therapy, drug and alcohol rehabilitations services, and other services to assist in the individual's transition out of prison and into the community.

In mid-1987, Freedom Ranch applied to the City of Tulsa for a permit to operate its halfway house program at 245 W. 12th Street under contract with the Oklahoma Department of Corrections. On September 1, 1987, the City of Tulsa granted Freedom Ranch a permit to operate as a "Transitional Living Center\Resident" at that location. That use was permissible as of right in the Central Business District, the

---

[2] Freedom Ranch only accepts clients who fall within the Oklahoma Department of Corrections classification of "non-violent offender." The facility in addition now requires that clients (1) not be considered a risk to the public; (2) not be classified as sex offenders; and (3) have a record that indicates they are amenable to rehabilitation. II Tr. 44-45.

zoning district in which the property is located. The City determined that Freedom Ranch's use fell within that category after examining, among other things, the contract between Freedom Ranch and the Department of Corrections.

Freedom Ranch thereafter began its operation as a halfway house. The facility at 245 West 12th is located in a deteriorated part of downtown Tulsa which has a high number of transients, bars and vacant buildings. (III Tr. 546) (testimony of Tulsa Police Department Lieutenant Richard Lawson). Indeed, Freedom Ranch has improved the building and area in which it is located.

During Freedom Ranch's operation, its recidivism rate for clients released into the community has been only 6% nine months after release. (II Tr. 83.) No complaints about the property or operations (other than about a mobile home which was temporarily placed on the property) were ever made during the entire time Freedom Ranch operated at 245 West 12th Street (Board of Adjustment minutes, p. 6)). The police department witness testified that since locating there, Freedom Ranch has not posed any problem in the area with respect to crime (III Tr. 548-550).[3]

Only after respondent, TwentyFirst Properties, which owns substantial property surrounding Freedom Ranch, tried

---

[3] The court of appeals stated that "[the] City adduced evidence, albeit controverted, that FRI posed a legitimate crime threat to the area," but the only testimony given that could hint such a thing was by the Lieutenant who testified about Freedom Ranch residents having committed crimes *after they left Freedom Ranch*. Calls to the police department from Freedom Ranch consisted of requests that the police arrest drunks and transient trespassers on Freedom Ranch's property (III Tr. 564-547). The only other calls from Freedom Ranch were three reports that residents had failed to check in (and therefore should be arrested for failure to appear). (III Tr. 547.)

unsuccessfully to get Freedom Ranch to give up its interest in the site so that they could develop it, did Freedom Ranch have difficulties with its zoning. (II Tr. 67-73.)

After nearly four years of operation, on February 6, 1991, the City served Freedom Ranch with a citation stating that the halfway house program should have been classified as a "Convict Pre-Release Center" under the City's zoning ordinance, and that — in order to continue in operation — Freedom Ranch was required to apply to the Board of Adjustment for a special exception.

Freedom Ranch appealed the reclassification of its use and, in the alternative, applied for a special exception to operate as a convict pre-release center. Following a hearing, the Board of Adjustment upheld the classification and denied the application. (App., *infra*, 23a-24a.)

B. The Decisions Below

Freedom Ranch appealed the Board of Adjustment's decision to the District Court of Tulsa County. It argued, among other things, that the application of the zoning ordinance to bar operation of the halfway house violated the Equal Protection Clause of the Fourteenth Amendment.

The court upheld the Board's decision (App., *infra*, 9a-21a). It found that the area immediately surrounding the halfway house consisted of "abandoned apartment buildings, vacant lots, older transient apartment buildings, two bars, and a liquor store" (*id.* at 20a). The City's comprehensive plan designated the area for "higher intensity comprehensive redevelopment," including "residential and office uses" (*id.* at 19a). The court concluded that "the granting of the special exception would be detrimental to the public welfare in frustrating the Comprehensive Plan" (*id.* at 20a).

The state court of appeals affirmed (App., *infra*, 2a-8a). It rejected Freedom Ranch's equal protection claim on the ground that "the orderly development of the Tulsa Central

Business District constitutes a legitimate City interest, and [the] City's denial of [Freedom Ranch's] application for zoning exception [is] rationally related to that interest" (*id.* at 5a (footnotes omitted)). The court stated, in a footnote, that the City "adduced evidence, albeit controverted, that [Freedom Ranch] posed a legitimate crime threat to the area, and that property values in the vicinity had fallen as a result of [Freedom Ranch's] presence" (*id.* at 5a n.6), but it did not support its statement with any citations to the record. As discussed above, the *uncontroverted* evidence at trial established that the facility did not affect crime in the area.

REASONS FOR GRANTING THE PETITION

In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court considered the constitutionality of a zoning ordinance that required a special use permit for the operation of a group home for mentally retarded individuals. There, as in this case, the city did not require a permit for other types of facilities housing more than one individual, including "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged * * * , private clubs or fraternal orders" (473 U.S. at 447).

Evaluating the justifications advanced in support of that different treatment, this Court first determined that "mere negative attitudes [of property owners], or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like" (473 U.S. at 448). Finding that Cleburne's other justifications were similarly baseless, the Court concluded that the permit requirement "rest[ed] on an irrational prejudice against the mentally retarded" and therefore violated the Fourteenth Amendment (473 U.S. at 450).

This case presents an important and recurring question regarding the application of *Cleburne* to halfway houses. May such facilities, which house only individuals convicted of *non-violent* offenses who have reached a status of community clearance, be singled out for a permit requirement solely on the basis of societal stereotypes, or must there be at least some proof that they present a greater risk to the surrounding community? The lower courts have reached different conclusions regarding that question. And the issue has arisen with considerable frequency, a frequency that will only increase in view of the need for facilities of all types to house the Nation's burgeoning prison population. Further review is clearly warranted.

A. The Courts Of Appeals Are Divided Concerning The Application To Halfway Houses Of This Court's Analysis In *Cleburne*.

In *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354 (6th Cir. 1992), the court of appeals held — in a case strikingly similar to this one — that the city's permit requirement violated the Equal Protection Clause. Louisville's zoning ordinance allowed as of right many types of multi-person dwellings; halfway houses, which were termed community training centers ("CTCs") in that opinion, required a special use permit.

The court of appeals observed that Louisville's stated justification for the permit requirement was "that occupants of a CTC are more likely to commit crimes than a person never having been convicted of a crime; and therefore, CTCs present a danger, or at least a perceived danger, to the community in which they operate" (958 F.2d at 1360). It held that the City had failed to satisfy its obligation to present "some data reflecting the extent of the danger" of recidivism in order to show the rationality of the zoning distinction: "[t]he rational relationship standard is not met when the classification relied upon by the legislative authority is 'so

attenuated as to render the distinction arbitrary or irrational.'" *Id.* at 1361 (quoting *City of Cleburne*, 473 U.S. at 446).

The court went on to state that

> [t]he lack of data supporting the city's contention that the incidence of crime is inflated in areas containing CTCs, and the evidence in the record of substantial community opposition to [the] proposed CTC, indicates that the purpose behind different treatment of CTCs by the current zoning regulations is to assure [area] residents * * * that they would not find themselves with a CTC as a neighbor.

958 F.2d at 1361. The court of appeals observed that *Cleburne* itself established the invalidity of that basis for differential treatment by rejecting negative attitudes and unsubstantiated fear as grounds for different zoning classifications. *Ibid.* (quoting *Cleburne*, 473 U.S. at 448).

There can be no doubt that the present case would have been decided the opposite way if it had come before the Sixth Circuit. The two zoning ordinances are virtually indistinguishable; if anything, Tulsa appears to allow as of right *more* multiple-person uses — and therefore is *more* discriminatory — than the Louisville ordinance. And in both cases the municipalities failed to present any evidence that halfway houses produce crime increases. The Sixth Circuit refused to uphold a zoning measure based on an unsupported stereotype, but the Oklahoma courts sanctioned that precise result in this case. *See also Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 999 n.30 (11th Cir. 1990) (directing district court on remand to apply *Cleburne* standard — especially prohibition against zoning distinctions based on "the prevailing negative attitude of property owners and community fears" — to halfway house's equal protection challenge to permit denial).

In 1993, however, the Eighth Circuit took the opposite position and failed to apply the *Cleburne* standard in a halfway house case. See *Bannum, Inc. v. City of St. Charles*, 2 F.3d 267 (8th Cir. 1993). The question in that case was whether the halfway house operator could be required to apply for a permit when application was not required of other multi-person users. The court upheld the application requirement for halfway houses despite the fact that the City presented no evidence to support the "threat to the public welfare" upon which, the court speculated, the "rational basis" for this requirement might have rested. 2 F.3d at 272. The Eighth Circuit stated:

> However, *Cleburne* is inapposite. The concerns the City of Cleburne relied on to require a permit would be irrational basis as applied to any home for the mentally retarded, see id., at 448-50, 105 S. Ct. at 3258-60, and the Court concluded that the permit requirement was really based on irrational prejudice. Here, the classification in the amended ordinance is addressed to half-way houses which serve any prisoner, ex-prisoner, or juvenile offender. *The City could rationally believe that some groups in this classification could pose a threat to the public welfare. Such concerns are not based on irrational prejudice, but rather on a realistic view that some members of these groups could pose a threat in some locations.*

Bannum, 2 F.3d at 272 (emphasis added).

The Eighth Circuit concluded that the City could impose a permit requirement based on an assumption that crime escalates and danger increases in neighborhoods that surround halfway houses. While the Eighth Circuit stated that it agreed that "mere negative attitudes and fear are insufficient basis to deny a permit," citing *Cleburne*, it reasoned, "[h]owever, in this case, Bannum is claiming it should not

have to apply for a permit at all." 2 F.3d at 272 n.9 — overlooking the fact that having to apply for a permit when others didn't was the precise factual scenario of *Cleburne* itself.

In sum, the present case plainly would have been decided differently if it had been brought before the Sixth Circuit. The Eleventh Circuit also has indicated that it would have ruled in petitioner's favor.

On the other hand, the court below and the Eighth Circuit have reached the opposite conclusion, holding that a zoning authority need not present facts to justify the assumptions underlying its classifications. This Court should grant review to eliminate this dispute among the lower courts.

B. Application Of The Permit Requirement To Close The Freedom Ranch Facility Violates The Equal Protection Clause.

This case is virtually an exact duplicate of the dispute that came before this Court in *Cleburne*. In both cases, zoning ordinances singled out a particular type of multiple-person dwelling for a permit requirement. In both, the question is "[m]ay the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?" (473 U.S. at 448). In *Cleburne*, the Court answered that question by analyzing the justifications proffered for the distinction. We follow the same approach here.

Both courts below relied on the same justification: that the halfway house would disrupt the orderly development of the area as set forth in Tulsa's comprehensive plan. But neither court explained the reasons for that conclusion.

Certainly concerns about density of population could not be a basis for the permit requirement. Equally or more dense residential facilities — apartments, fraternity houses, hotels, motels, boarding houses, group homes, and the like — may

be operated without any permit. See *Cleburne*, 473 U.S. at 449-450.

And the permit requirement could not be tied to the fact that social services are provided to halfway house residents. Similar residential treatment facilities — homeless shelters and residences for recovering drug addicts and alcoholics — could operate without first obtaining a permit.

The most likely rationale underlying the courts' justification is that development would be more difficult because prospective property owners and tenants would not want to locate near a halfway house because of fear of crime.[4] As this Court explained in *Cleburne*, however, "mere negative attitudes [of property owners], or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding are not permissible bases for" differential zoning treatment (473 U.S. at 448). *See also Bannum*, 958 F.2d at 1361 (permit requirement for halfway house could not be upheld on ground that property owners did not want halfway house as a neighbor).

Tulsa did not establish that these fears are justified because the halfway house in fact has lead to increased crime in the area. The trial court made no such finding. Indeed, it could not have done so because the record simply does not permit such a conclusion:

- petitioner introduced evidence based on 19 existing studies of 140 different community programs

---

Indeed, the testimony of the City of Tulsa's witnesses at trial each revealed that if Freedom Ranch were not housing convicts, it would not be injurious to the Central Business District *or* inconsistent with the goals of the Comprehensive Plan. See James Durham (IV Tr. 67-97); Robert Gardner (IV Tr. 132, 155, 170, 171, 181); Genevieve Rogers (IV Tr. 253); Jerry Sutton [V Tr. 27-28, 30-31, 38, 39); Robert Bartlett (V Tr. 103, 104); Paul D. Wilson (V Tr. 205); and Jack Crowley (V Tr. 249).

demonstrating that halfway houses do not cause increased crime in the neighborhoods in which they are located nor do they have a negative impact economic (II Tr. 257-261), and Tulsa did not introduce a single study to the contrary;

- the police lieutenant responsible for the district in which the halfway house is located testified that crime had *not* increased as a result of the presence of the facility, rather, he believes the halfway house is a stabilizing influence (III Tr. 548-550), and there was no evidence to the contrary.

The only possible conclusion is that, as in *Cleburne*, requiring the permit in this case * * * rest[s] on an irrational prejudice" (473 U.S. at 450). For that reason, the permit requirement violates the Equal Protection Clause.

C. The Constitutionality Of Zoning Ordinances That Single Out Halfway Houses For A Permit Requirement Is A Recurring Legal Issue Of Considerable Practical Importance.

There is now a desperate shortage of prison capacity in the United States. Federal prisons are operating at 151% of their capacity. State facilities are similarly overcrowded.[5]

Halfway houses are an important — and widely-recognized — alternative to traditional incarceration. Today, the Federal Bureau of Prisons contracts with approximately 4,000 private halfway houses, and most states use private or government halfway houses for offenders.[6] These facilities

---

[5] International Association of Residential and Community Alternatives, *Synopsis of Statement Before the United States Sentencing Commission* (Mar. 15, 1993).

[6] National Committee on Community Corrections, *A Proposal for Action* 3 (1993).

are less expensive — approximately one-half the cost per day of a typical state prison[7] — and more effective at reducing recidivism.[8] In addition, use of halfway houses creates more space in conventional facilities for persons convicted of violent crimes.

Halfway houses work by giving offenders the skills they need to re-enter society: alcohol and drug rehabilitation therapy, family and parenting counseling, relapse prevention training, and job and education counseling. With these skills, offenders can become productive members of the community.[9]

Of course, these programs cannot work if halfway houses are not permitted to operate in the communities that offenders come from. The present case constitutes an all-too-typical display of the "not in my backyard" syndrome that makes it difficult to site facilities such as halfway houses. The legal question in this case — whether such facilities may be subjected to more onerous burdens than other types of multiple-person dwellings based solely upon unsupported stereotypes regarding offenders — is thus critical to the viability of the halfway house as an alternative to traditional incarceration. The Court should grant certiorari and reaffirm that a community must rely upon solid evidence, not just

---

[7] National Committee on Community Corrections, *supra*, at 13.

[8] In one to two years following release, halfway house participants had a 25% recidivism rate, compared with 62% for individuals released directly from prison. International Association of Residential and Community Alternatives, *Findings of National Research* (Nov. 1993).

[9] Testimony of IARCA before the Commerce, Justice, State and Judiciary Subcommittee of the Committee on Appropriations of U.S. House of Representatives, May 7, 1993.

unsupported stereotypes, if it wishes to subject an unpopular group to increased burdens under local zoning law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

N. KAY BRIDGER-RILEY*
LISA MICHELLE BOHANNAN
Bridger-Riley & Associates, P.C.
8908 South Yale Ave., Suite 230
Tulsa, Oklahoma 74137
(918) 494-6699

**Counsel of Record*

OCTOBER 1994

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, July 13, 1994

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

79,170 In the Matter of the Application of Freedom Ranch, Inc., an Oklahoma non profit organization.
Freedom Ranch, Inc. v. Board of Adjustment of the City of Tulsa and Twenty-First Properties, Inc., intervenor.
Certiorari denied.
CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Hargrave,
Wilson, Kauger, Summers, Watt, JJ.

* * *

CHIEF JUSTICE

APPENDIX B

RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

DIVISION NO. III

IN THE MATTER OF THE APPLICATION OF FREEDOM RANCH, INC., an Oklahoma non-profit organization,	)	
FREEDOM RANCH, INC.,	)	
Appellant,	)	
vs.	)	Case No. 79,170
BOARD OF ADJUSTMENT OF THE CITY OF TULSA,	)	
Appellee,	)	
and,	)	
TWENTY FIRST PROPERTIES, INC., Intervenor,	)	
Appellee.	)	

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE ROBERT J. SCOTT, JUDGE

AFFIRMED

OPINION

Opinion by Robert L. Bailey, Judge:

Freedom Ranch, Inc. (FRI) seeks review of the Trial Court's judgment, after hearing de novo, affirming the denial of FRI's request for a special zoning exception by the Board of Adjustment of the City of Tulsa (City). In this appeal, FRI challenges the constitutionality and validity of City's zoning scheme and application thereof to FRI's property.

FRI operates a facility[1] under contract with the Oklahoma Department of Corrections housing convicts nearing the end of their sentences. FRI provides undeniably positive benefits such as counseling, and the inmates have an unusual degree of freedom of movement both within and without the facility. The facility is located in an area of downtown Tulsa which is zoned Central Business District and permits "intense use" of the property for commercial, multi-family or office use. Although the area immediately surrounding FRI's facility is admittedly somewhat run down, the area is classified as Development Opportunity Site No. 3 under City's Comprehensive Plan for development and, as such, is designated for redevelopment consistent with the plan to revitalize the Tulsa Central Business District.

City's zoning code specifically lists "convict pre-release center" as a Use Unit 2 permitted to operate in the Central Business District only if granted a special exception by the Board of Adjustment. On the other hand, "residential treatment centers" and "transitional living center" are classified Use Unit 5 permitted within the Central Business District without necessity of a special exception. In 1987, City evidently issued FRI a zoning clearance permit to

---

[1] FRI first leased, then purchased, the facility from Intervenor Twenty First Properties, Inc.

operate the facility as a Use Unit 5 "transitional living center."

In 1991, however, and apparently after inspection by a City Code Enforcement Officer, City notified FRI that FRI must apply for a special exception to operate as a Use Unit 2 "convict pre-release center." After hearing, City's Board of Adjustment upheld the decision of the Code Enforcement Officer, determining that FRI's facility fell under the definition of a Use Unit 2 convict pre-release center and denying FRI's application for special exception. FRI appealed to the Trial Court which also denied FRI's application for special exception. FRI appeals.

FRI first challenges the constitutionality of City's zoning code as denying the equal protection guarantees of both the Oklahoma and United States Constitutions. In support of this proposition, FRI alleges City's unsubstantiated negative attitudes toward and/or fear of FRI's operation of its facility, serving as a basis for according different zoning treatment to essentially the same types of proposed use, denies FRI equal protection.[2]

We indulge a presumption of validity of municipal zoning ordinances and regulations.[3] That is, so long as such ordinances and regulations create classifications based not

---

[2] Seem *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning ordinance requiring special use permit for group home for mentally retarded while not requiring same for other "group" facilities violates equal protection clause); *Bannum, Inc. v. City of Louisville, KY*, 958, F.2d 1354 (6th Cir. 1992) (requirement that "community training center") receive special use permit because of City's fear, without supporting data, that persons living therein are more likely to commit a crime held invalid).

[3] *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

upon a suspect class nor involving a fundamental right, such classification need only rationally relate to a legitimate purpose in order to withstand constitutional challenge.[4] In the present case, we deal with neither a suspect class (convict pre-release centers) nor a fundamental right (to operate a convict pre-release center without regard to zoning ordinances). Thus, if there exists a legitimate purpose for requiring convict pre-release centers to obtain a special zoning exception, such treatment is constitutional.

The record herein reveals City adduced evidence of the orderly development of its Central Business District in accordance with the provisions of its Comprehensive Plan which includes the area in which FRI's facility is located. We hold the orderly development of the Tulsa Central Business District constitutes a legitimate City interest, and find City's denial of FRI's application for zoning exception rationally related to that interest.[5,6] Under these specific facts and circumstances, we find no constitutional infirmity in City's zoning classifications and the application thereof to FRI.

---

[4] *Jacobs, Visconi & Jacobs v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1991) (purpose of retaining vitality of downtown retail area sufficient to deny application to rezone residential land to develop suburban shopping mall); *Mahoney v. City of Chicago*, 137 N.E.2d 37 (Ill. 1956) (zoning ordinance restricting funeral homes to business district while allowing other businesses permissible in areas zoned for apartments held reasonable and within legislative discretion).

[5] See *Jacobs, Visconi & Jacobs*, 927 F.2d at 1119.

[6] We also note City adduced evidence, albeit controverted, that FRI posed a legitimate crime threat to the area, and that property values in the vicinity had fallen as a result of FRI's presence.

FRI also complains City's zoning ordinance is unconstitutionally vague,[7] noting City's zoning code does not define a "convict pre-release center," and arguing inability to ascertain from the zoning code whether FRI is operating such a center as opposed to a residential treatment center, transitional living center or detention/correctional facility. However, the record reflects FRI operates its facility under contract with the Department of Corrections pursuant to which FRI houses persons convicted of a crime ("convicts") who have not been paroled ("pre-released") in a group setting ("center"); that is, a "convict pre-release center" in City zoning ordinance parlance. Moreover, City's zoning code defines detention/correctional facility, which requires a special zoning exception, as a "facility for the detention, confinement, treatment and/or rehabilitation of persons arrested or convicted... [including] pre-release center[s]." We therefore find City's zoning ordinance not unconstitutionally vague.

Finally, FRI complains the Trial Court erred in finding that permitting FRI's request for a special zoning exception would be contrary to the public interest, arguing compatibility of FRI's use of the property with the basic use authorized within the area zoned, and that actual evidence of detriment, not subjective fears, must be presented in opposition to the exception.[8] However, FRI bears the burden of proving the requisite conditions for a special exception have been met,

---

[7] Citing, inter alia, *City of Independence v. Richards*, 666 S.W.2d 1, 7 (Mo.App.) (zoning ordinances must operate uniformly and avoid arbitrary enforcement).

[8] Citing *Application of Volunteers of America*, 749 P.2d 549 (Okl. 1988) (reversing denial of zoning variance on grounds the lower court considered too large a "neighborhood", and that such a denial may not be based on potential adverse effects on the neighborhood).

i.e., that the exception be "in harmony with the spirit and intent of the code, and will not be injurious to the neighborhood or otherwise detrimental to the public welfare."[9] City's zoning standards further provide that the code was enacted for the purposes of, *inter alia*, "promoting the development of the community in accordance with a comprehensive plan."[10]

In the present case, the record reveals locations of FRI's facility within Opportunity Site 3 of City's Comprehensive Plan, a site within the Central Business District possessing great redevelopment potential and expectations of extensive redevelopment of the area for office and residential use. Further, City adduced evidence that numerous "clients" of FRI had been involved in "serious incidents" requiring reports to the Department of Corrections. Finally, City proffered evidence that the value of the surrounding property had, in fact, been adversely affected by the FRI facility. We therefore find evidence in the record demonstrating that the approval of FRI's application for special exception would not promote 'the development of the community in accordance with a comprehensive plan"[11] nor be "in harmony with the spirit and intent" of City's zoning code.[12]

These proceedings are equitable in nature and, as such, the judgment of the Trial Court will not be disturbed unless

---

[9] Tulsa, Ok. Rev. Ord. tit. 42 ch. 16 §1608.3; *Application of Volunteers of America*, 749 P.2d at 551 (citation omitted).

[10] Tulsa, Ok. Rev. Ord. tit. 42 ch. 16 §101.A.

[11] Tulsa, Ok. Rev. Ord. tit. 42 ch. 16 §101.A.

[12] City, Ok. Rev. Ord. tit. 42 ch. 16 §1608.3; *Application of Volunteers of America*, 749 P.2d at 551 (citation omitted).

against the clear weight of the evidence.[13] We hold the basic facts found by the Trial Court as a foundation for its judgment not against the clear weight of the evidence and, accordingly, find no error in the judgment denying FRI's application for a special exception to City's zoning code.

The Order of the Trial Court is therefore AFFIRMED.

GARRETT, V.C.J. and HUNTER, P.J. concur.

---

[13] *Application of Volunteers of America*, 749 P.2d at 552 (citation omitted).

APPENDIX C

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

IN THE MATTER OF THE APPEAL OF	)
FREEDOM RANCH, INC., an Oklahoma	)
non-profit corporation, from a	) Case No.
decision of the Board of Adjustment	) CJ 91 02347
of the City of Tulsa, Oklahoma	)
(BOA case #15680)	)

JOURNAL ENTRY OF JUDGMENT

Now on this 10th day of January, 1992, the above-entitled cause comes on for decision before the undersigned Judge of the District Court, the Appellant, Freedom Ranch, Inc., appearing by its attorney, John Moody, the City of Tulsa, Oklahoma appearing by its attorney, Alan Jackere, Assistant City Attorney, the Intervenor, Twenty First Properties, Inc. appearing by its attorneys, Roy Johnsen (Epperson and Johnsen) and Tom Nally (Nichols, Wolfe, Stamper, Nally and Fallis, Inc.) and the Intervenors, Karlene Chancellor, et al. appearing by their attorney, Joe Woltz (Brune, Pezold, Richey and Lewis).

In accordance with the findings of fact and conclusions of law set forth within the attached Transcript of Proceedings it is ORDERED, ADJUDGED AND DECREED:

1. The Appellant's appeals from the Board of Adjustment of the City of Tulsa, Oklahoma are denied, and the decisions of the Board of Adjustment of the City of Tulsa, Oklahoma are affirmed.

2. The use of the following described property:

TRACT I.

All of Lot Ten (10), and the West Thirty-Six and Seven-Tenths feet (36.7') of Lot Eleven (11), Block One (1), GEORGE B. PERRYMAN ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof; commonly known as 243 through 245 West 12th Street, Tulsa, Oklahoma

TRACT II.

The East Twenty-six feet of Lot Eleven (11), Block One (1), GEORGE B. PERRYMAN ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof

being made by the Appellant is a "convict pre-release center" and is an included use within Use Unit 2 as set forth within the Tulsa Zoning Code.

3. The Appellant's application for a Special Exception to permit the use of the following described property as a convict pre-release center is denied:

TRACT I.

All of Lot Ten (10), and the West Thirty-Six and Seven-Tenths feet (36.7') of Lot Eleven (11), Block One (1), GEORGE B. PERRYMAN ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof; commonly known as 243 through 245 West 12th Street, Tulsa, Oklahoma

TRACT II.

The East Twenty-six feet of Lot Eleven (11), Block One (1), GEORGE B. PERRYMAN ADDITION, an

Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof

TRACT III.

That portion of Lots Three (3) and Four (4), Block One (1), GEORGE B. PERRYMAN ADDITION, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof, commonly known as 250, 258, and 260 West 11th Street, Tulsa, Oklahoma.

/s/
ROBERT J. SCOTT
Judge of the District Court
Tulsa County, Oklahoma

APPROVED AS TO FORM [AND CONTENT] ONLY _____:

/s/
John W. Moody
550 ONEOK Plaza
Tulsa, Oklahoma 74103

Attorney for Appellant,
Freedom Ranch, Inc.

/s/
Alan L. Jackere
Assistant City Attorney
200 Civic Center, Room 316
Tulsa, OK 74103

Attorney for City of Tulsa,
Oklahoma

/s/

Roy D. Johnsen
Epperson & Johnsen
201 W. 5th St., Suite 440
Tulsa, OK 74103-4211

/s/

S. M. Fallis, Jr.
Nichols, Wolfe, Stamper, Nally
& Fallis, Inc.
124 E. Fourth Street
Suite 400, Old City Hall Bldg.
Tulsa, Oklahoma 74103-4004

Attorneys for Intervenor,
Twenty First Properties, Inc.

/s/

Brian R. Huddleston
Brune, Pezold, Richey & Lewis
700 Sinclair Building
6 E. 5th Street
Tulsa, Oklahoma 74103

Attorney for Intervenors,
Karlene Chancellor, Radio, Inc.
Balcor Property Management, Inc.
Downtown Tulsa Unlimited, Inc.
Genave Rogers

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

FREEDOM RANCH, INC., IN RE:)
BOARD OF ADJUSTMENT) Case No. CJ-91-2347

TRANSCRIPT OF PROCEEDINGS

JANUARY 10, 1992

BEFORE THE HONORABLE ROBERT J. SCOTT

TULSA COUNTY, OKLAHOMA

APPEARANCES

FOR THE PLAINTIFF:
JOHN MOODY
Attorney at Law

FOR THE DEFENDANTS:

ALAN JACKERE
Attorney at Law

JOE WALTZ
Attorney at Law

ROY JOHNSON
Attorney at Law

TOM NALLY
Attorney at Law

Reported By
ROXTON W. SPEAR, CSR
Official Court Reporter
Tulsa County Courthouse
Tulsa County

PROCEEDINGS

January 10, 1992

THE COURT: This is matter of Appeal of Freedom Ranch, CJ-91-2347. Comes on for decision.

The Appellant, Freedom Ranch, Inc., seeks a review by trial de novo of the decision of the Board of Adjustment of the City of Tulsa determining that the use of 245 West 12th Street in Tulsa, Oklahoma is a Use Unit 2, a convict prerelease center instead of either a residential treatment center or a transitional living center, which are both Use Units 5 under the Zoning Code of Tulsa.

The property is located in the Central Business District and Use Unit 2 is permitted without Board of Adjustment approval, while Use Unit 5 is permitted only as a special exception when the applicant's evidence establishes, by the basic physical facts, that the requested use is compatible with the basic use authorized within the particular zone and does not endanger the public health, safety or general welfare of the area affected. *Application of Volunteer of America*, 749 P.2d 549, an Oklahoma 1988 decision.

As an alternate request, appellant requests a special exception to permit a Use Unit 2 operation at its location and also as 250 West 11th and 258 West 11th and 260 West 11th Street, in Tulsa, Oklahoma.

On September 1st of 1987, Tulsa issued a zoning clearance permit and a certificate of use and occupancy to Freedom Ranch, describing the operation as a Use Unit 5 transitional living center within the Central Business District.

On February 6th, 1991 the Zoning Code enforcement officer noticed Freedom Ranch II was violating the Code because its use fell within Use Unit 2, rather than Use Unit 5. This determination was appealed and on April 23rd, 1991

the Board of Adjustment affirmed the enforcement officer's determination. This appeal resulted.

After the appeal to this Court the Appellant Freedom Ranch was granted leave to amend its original notice of appeal to raise additional issues, as follows: Enforcement officer was estopped from revoking the prior permit and certificate of use of September 1st, 1987 relied upon by Freedom Ranch.

Two, the provisions of Title 42 of the Zoning Code and specifically, Section 17 through — 700 through 704 and Sections 1202 and 1800, as applied to Freedom's use of the property are unconstitutional on their face and unconstitutionally vague in that the Code fails to define or permit a halfway house or define the term convict pre-release center under Section 1202, Use Unit 2. That a person of ordinary ability is unable to determine whether a halfway house is permitted in the City or whether a halfway house is a prerelease center, as such term, is not defined.

Before trial the Appellant further raised an issue involving its right to a fair and impartial hearing before the Board of Adjustment because of an alleged conflict of interest claim concerning a Board member.

Prior to the commencement of the hearing on the appeal the Court first heard evidence supporting the claim of a denial of a fair and impartial hearing before the Board. Under the evidence presented, the Court found that no private benefit, direct or indirect, financial or otherwise, had come to the Board member as a result of the public action on the application. In view of the vote of the other members of the Board and absence of discussion, except in a public form, the application is constitutional and statutory rights to a fair and impartial hearing and due process had not been substantially denied, and as a result the Court proceeded in hear the appeal.

Evidence was presented and taken under advisement to permit the Court to examine the evidence presented by exhibits introduced during the trial. Briefs of the parties were also submitted and considered by the Court.

The Court concludes, as a matter of law, that the Board of Adjustment powers are limited to those granted by statute and implemented by ordinance and the Board of Adjustment was not empowered to make a judicial determination of estoppel and it cannot be a proper issue in this review.

When a decision of a Board is appealed to the District Court it is a trial de novo and the scope of inquiring is the same as the Board. *Banks versus City of Bethany*, 541 P.2d 178.

In addition, a municipality is not estopped from enforcing its zoning laws, either by issuance of a permit or laches, and that the prior issuance to the Appellant of the zoning clearance permit and the certificate of use could not confer rights in contravention of the zoning laws. *Ashland Oil, Inc. v. The Corporation Commission*, 595 P.2d 423.

The Court also finds and concludes that the Zoning Code is not unconstitutional on its face nor unconstitutional as applied to Freedom Ranch in accordance with its allegations.

In getting to the point of making a decision on the use and also the decision on the exceptions, the Court has attempted to use the law as set forth in the *Application of Volunteers of America*, 749 P.2d 549.

Under that case we learn and see that a special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissable, absent any fact or circumstances negating that presumption.

The Volunteer case involved a prison prerelease center in the Central Business District of Tulsa in a district zoned

commercial high intensity, just as this case does. Prison inmates would be rehabilitated at the center during the last few months of their prison term so they would be better equipped to reenter society after their release.

The trial court found that the center appeared satisfactory to meet an existing need in Tulsa. However, because of fears, which may or may not have a basis in fact, would probably adversely affect the future development in the area. As a result the trial court denied the application. On appeal the trial court was reversed and I think we have several principles of law that can be followed in the trial of this case, announced in that case.

In that case they pointed out the distinction between a variance and excuse violation and a special exception, a conditionally permitted use, and also held that it did not shift the burden of proof from the applicant to the protestant. They are granted under different conditions.

A variance, under the terms of 11 OS 44-107, requires a finding by the Board that, one, the applicant — the application of the ordinance to the subject property would create unnecessary hardship; and two, the conditions of the applicant's property are peculiar to that particular piece of property; and three, the relief, if not granted — the relief if granted, would not be detrimental to the public good nor impair the purpose and intent of the ordinance or the Comprehensive Plan.

It also tells us that a special exception is granted within the condition — in accordance with the conditions set forth in the ordinance itself. That Tulsa's ordinance, Title 42, Section 1680.3, requires the finding by the Board that, one, the special exception will be in harmony with the spirit and intent of the Code; and two, will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

Volunteer case also tells us tact a neighborhood is a place near; an adjoining or surrounding district; a more immediate vicinity. It is a gathering of local interest arising from a problem confined to a limited area. It also tells us that the bounderies are not determined solely by lineal feet, rather many factors should be considered, including geography, terrain, barriers, both God made and man-made.

Also Volunteers tells us that the interstate highway — in connection with the Volunteer case, the interstate highway that was involved was elevated and, as constructed, was a substantial barrier between the protestants in the Volunteer case from the residential area north of the interstate highway and the proposed site south of the expressway.

The Court also held that the protestants' fears that were — fears were not based on fact and also that it appears that they came from residents outside of the neighborhood.

The Volunteer case also tells us that denial of special exceptions, based on fears which may or may not have a basis in fact, is not sufficient under the ordinance test. Actual evidence must be presented to show the center will be injurious to the neighborhood or otherwise detrimental to the public welfare.

The Volunteer case further tells us, and some other case law tells us, that detrimental to the public welfare means detrimental refers to a use less than offensive or noxious. *Scillia v. Szalai*, 59 A.2d, 435. Anything which is not for the best interest of the public would be detrimental to the public welfare. *Tanner v. Bacon*, 136 P.2d 957, a Utah case.

As to a variance, one element that must be establish is that the excused violation would not be contrary to the public interest. *Vinson v. Medley*, an Oklahoma case in 737 P.2d 932, tells us that a variance is contrary to the public interest if, in the opinion of a reasonable map, it conflicts with the public interest.

As a result of this I would assume that a use would be detrimental to the public welfare if, when presented with the facts, in the opinion of a reasonable man, the granting of a special exception is not for the best interest of the public.

My findings of fact under the law and the evidence in the case are as follows: That the Applicant's use of the property is a prison prerelease center in which a large number of prison inmates who are still serving their sentence of incarceration in the state prison system are provided with room and board during the last part of their prison terms so they will be better equipped to reenter the Tulsa society after released from incarceration. They participate in a nationally certified treatment program through counseling for alcohol, drug and behavioral disorders. The restrictions on their liberties is imposed principally by a check in, check out system, by which their leaving the facility is approved by the Department of Corrections and their time and whereabouts are structured by a schedule. An unauthorized absence subjects the inmate to charges of crime of escape.

The Court further finds that the neighborhood involved, as fixed by the evidence in this case and under the law that I have previously read, is an area in the Central Business District, designated in the Comprehensive Plan as Cathedral Square. The area is a transitional neighborhood in which public funds for public improvements have been invested by the City in execution of the Comprehensive Plan to redevelop the Cathedral Square into one in which residential and office uses are particularly encouraged.

The immediate part of the neighborhood in which the Applicant's property is located is designated as Opportunity Site 3 and intended for higher intensity comprehensive redevelopment.

In addition to the investment of the public funds in the execution of the planned redevelopment, private funds have also been invested, such as the Center Plaza Apartment

complex. Also long time owners in the area have retained their holdings during the transition period of their neighborhood while the income was low for the properties involved in order to gain benefits of their properties from the partially executed plan for redevelopment of the neighborhood when it would occur.

Being a transitional neighborhood, the adjoining properties to Applicant's property consist of abandoned apartment buildings, vacant lots, older transient apartment buildings, two bars and a liquor store.

The Court also finds that the Zoning Code permits a wide variety of use in the Central Business District and that the Applicant's desired use of the property is one of the enumerated uses which the legislature of the City has determined is a permissable use, absent any fact or circumstances negating the presumption and has delegated to its administrative board limited authority to allow the mechanism of special exceptions.

The Court finds that the permitting of the special exception to applicant for subject property would comply with the actual Zoning Code as to all physical requirements, but the granting of the special exception would be detrimental to the public welfare in frustrating the Comprehensive Plan that is not mere speculation, but has been partially executed by investment of public funds in the construction of Denver Avenue exit of the southern leg of the interdisbursal loop from the Central Business District, acquisition of property through urban renewal programs and other public endeavors. It has also been partially executed by private investments, such as Center Plaza Apartment complex.

And therefore, I find that the applicant has failed to establish its special exception use in that he has not established that it would be in harmony with the spirit and intent of the Code. He has not established that it would not

be injurious to the neighborhood, and has not established that it will not otherwise be detrimental to the public welfare.

And as a result, the decision of the Board of Adjustment will be affirmed.

Anything further?

(Proceedings concluded.)

APPENDIX D

CITY BOARD OF ADJUSTMENT
MINUTES of Meeting No. 585
Tuesday, April 23, 1991, 1:00 p.m.
City Council Room, Plaza Level
Tulsa Civic Center

MEMBERS PRESENT	MEMBERS ABSENT
Bolzie	
Bradley	
Chappelle	
Fuller	
White, Chairman	

STAFF PRESENT	OTHER PRESENT
Gardner	Jackere, Legal Department
Jones	Hubbard, Protective Inspections
Moore	
Richards	

The notice and agenda of said meeting were posted in the Office of the City Clerk on Monday, April 22, 1991, at 10:40 a.m., as well as in the Reception Area of the INCOG offices.

After declaring a quorum present, Chairman White called the meeting to order at 1:00 p.m.

* * * *

UNFINISHED BUSINESS

Case No. 15680

Action Requested:

An appeal of the decision of a Code Enforcement officer in determining the existing use is Use Unit 2, not a Use Unit 5 — Transitional Living Center and/or Residential

Treatment Center — Section 1605. APPEALS FROM AN ADMINISTRATIVE OFFICIAL — Use Unit 5.

Special Exception to conduct operations utilizing 243-245 West 12th Street and additional properties as a halfway house for the rehabilitation of individuals with an alcoholic and/or chemical dependency criminal history - irrespective of the Use Unit classification determined by the Code Enforcement officer or the Board of Adjustment — Section 701. PRINCIPAL USES PERMITTED IN COMMERCIAL DISTRICTS and Section 1606. INTERPRETATION.

Variance of the one-fourth mile (1,320') spacing requirement between residential treatment centers, transitional living centers, emergency or protective shelters — Section 1205.C.4. USE UNIT 5. COMMUNITY SERVICES AND SIMILAR USES — Use Conditions — Use Unit 5, located 243-245 West 12th Street and 250-260 West 11th Street.

* * * *

Board Action:

On MOTION of BRADLEY, the Board voted 5-0-0 (Bradley, Bolie, Chappelle, Fuller, White, "aye"; no "nays"; no "abstentions"; none "absent") to *UPHOLD* the decision of the Code Enforcement officer in determining the existing use is a Use Unit 2 Residential Treatment Center — Section 1605. APPEALS FROM AN ADMINISTRATIVE OFFICIAL — Use Unit 5; finding the use to be a correctional facility housing inmates, not on probation or parole, under the supervision of the Department of Corrections.

* * * *

Board Action:

On MOTION of BRADLEY, the Board voted 4-1-0 (Bradley, Bolzie, Fuller, White, "aye"; Chappelle, "nay"; no "abstentions"; none "absent") to *DENY* a Special Exception to conduct operations utilizing 243-245 West 12th Street and additional properties as a halfway house for the rehabilitation of individuals with an alcoholic and/or chemical dependency criminal history — irrespective of the Use Unit classification determined by the Code Enforcement officer or the Board of Adjustment — Section 701. PRINCIPAL USES PERMITTED IN COMMERCIAL DISTRICTS and Section 1606. INTERPRETATION; and to *WITHDRAW* a Variance of the one-fourth mile (1,320') spacing requirement between residential treatment centers, transitional living centers, emergency or protective shelters — Section 1205.C.4. USE UNIT 5. COMMUNITY SERVICES AND SIMILAR USES — Use Conditions — Use Unit 5; finding a correctional facility is not compatible with the area, and the use is not in accordance with the District 1 Plan; finding that there are a number of similar facilities in and around the downtown area, which would tend to create a clustering effect; and finding that the variance request is not required, since the Board determined the existing use to be classified under Use Unit 2; on the following described property:

All of Lots 3, 4 and 10, and the west 36.7' of Lot 11, and the east 26' of Lot 11, Block 1, George B. Perryman Addition.

APPENDIX E

The provision of the City of Tulsa Code applicable to this case (see Pet. xxx n. xxx provide in pertinent part:

SECTION 1202. USE UNIT 2. AREA-WIDE SPECIAL EXCEPTION USE

A. Description

Uses which in some instances may be suitable for location in any district, but because of their potential adverse influence on adjacent properties require site review and are therefore permitted in all districts, as a special exception requiring Board of Adjustment approval.

B. Included Uses:

Adult Detention Center
Airport, Heliport
Bus Station
Cemetery
Convict Pre-release Center
Correctional Community Treatment Center
Crematory
Governmental Services, NEC
Hydro-electric Generation Plant
Jail

Juvenile Delinquency Center
Mausoleum
Post Office
Prison
Rifle and Skeet Range, Gun Club
Sanitary Land Fill
Sewage Disposal Facility
Water Treatment Plant
Construction facilities (off site)
Uses which utilize tents, canopies or open air activities* such as:
- Carnival
- Christmas tree sales
- Circus
- Fruit and vegetable sales
- Plant sales
- Other sale of merchandise
- Tent Revival

* "Open air activities shall include sales from trucks, trailers, pickups and other vehicles."

SECTION 1205. USE UNIT 5. COMMUNITY SERVICES & SIMILAR USES

A. Description

Community services, cultural, educational, recreational, and religious facilities, and certain residential facilities which are needed in residential areas to serve the residents or need a residential environment, but which may be objectionable to nearby residential uses. These uses are permitted by special exception in some districts, by right in some districts, and prohibited in other districts.

B. Included Uses:

Aquarium
Art Gallery, not operated for profit
Children's Nursery
Church
College
Community Center
Community Group Home
Convent, Monastery and Novitiate
Cultural Facility, NEC
Day Camp
Emergency and Protective Shelter
Golf Course
Hospital
Library
Marina
Museum
Nursing Home
Planetarium
Private Club or Lodge, the chief

activity of which is a service not carried on as a business.
Public Park
Public Tennis Court
Residential Treatment Center
Schools, offering a compulsory education curriculum
Transitional Living Center
University

Supreme Court, U.S.
FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-652

In The Supreme Court of the United States

OCTOBER TERM, 1994

FREEDOM RANCH, INC.,
Petitioner,

v.

BOARD OF ADJUSTMENT OF THE CITY OF TULSA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Appeals

BRIEF IN OPPOSITION

Alan L. Jackere
Assistant City Attorney
City of Tulsa
200 Civic Center, #316
Tulsa, OK 74103
(918) 596-7717

Attorney for Respondent
Board of Adjustment of
the City of Tulsa

Thomas P. Nally *
Nichols, Wolfe, Stamper, Nally,
Fallis & Robertson, Inc.
124 East Fourth St., Suite 400
Tulsa, OK 74103-5010
(918) 584-5182
*Counsel of Record

Roy D. Johnsen
Janine H. VanValkenburgh
Epperson & Johnsen
201 West Fifth St., Suite 440
Tulsa, OK 74103-4211
(918) 585-5641

Attorneys for Respondent
Twenty First Properties, Inc.

35 pp

QUESTIONS PRESENTED

The City of Tulsa's zoning ordinances provide that convict pre-release centers, adult detention centers and jails, together with various other uses, are permitted within the Central Business District of the City of Tulsa only upon the approval by the City of Tulsa Board of Adjustment, of an application to permit the particular use, at the specific location (referred to in the state enabling legislation and the Tulsa zoning ordinances as a "special exception"). The City of Tulsa's zoning ordinances also state that establishments that provide housing for individuals receiving drug and alcohol treatment and counseling services, and similar social services, are permitted within the Central Business District of the City of Tulsa, without the necessity of obtaining a special exception.

The questions presented in the case at bar are whether the Oklahoma Court of Appeals correctly decided that the City of Tulsa zoning ordinances that require a special exception to operate a convict pre-release center did not violate the Equal Protection Clause of the United States Constitution, are constitutionally firm on their face, and are constitutionally firm as applied to the convict pre-release center known as "Freedom Ranch," that is operated by the Petitioner, Freedom Ranch, Inc. ("Freedom Ranch").

STATEMENT AS TO AFFILIATED COMPANIES

Pursuant to Rule 29.1 of the Rules of this Court, Twenty First Properties, Inc. states that it has no parent company and no subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (i)

STATEMENT AS TO AFFILIATED COMPANIES . (ii)

TABLE OF CONTENTS . . . . . (iii)

TABLE OF AUTHORITIES . . . . . (v)

SUMMARY OF ARGUMENT 1

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW 3

FACTS 5

A. The Nature of Freedom Ranch's Operation . . 5

(1) Freedom Ranch houses violent criminals 5

(2) Freedom Ranch's operation increases crime in the neighborhood 7

(3) Freedom Ranch's convict pre-release center (Use Unit 2) is different from uses included within Use Unit 5 8

B. The Issuance of the Zoning Clearance Permit 10

C. The Comprehensive Development Plan of the City of Tulsa 11

D. Board of Adjustment Action on Other Applications for Special Exceptions to Permit Convict Pre-release Centers 13

REASONS FOR DENYING THE WRIT 14

A. The Opinion of the Oklahoma Court of Appeals is in Accord with this Court's Decision in Cleburne 14

B. The Decisions of the United States Circuit Courts of Appeal are Consistent in their Application of the Principles of Cleburne . . 17

C. The Freedom Ranch Case would be Decided the Same in Both the Sixth and Eighth Circuits 22

D. There are No Special Reasons for this Court to Grant a Writ of Certiorari in this Case . . 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Application of Freedom Ranch, Inc.,
878 P.2d 380 (Okla. Ct. App. 1994) 4, 15, 16

Bannum, Inc. v. City of Fort Lauderdale,
901 F.2d 989 (11th Cir. 1990) 24

Bannum, Inc. v. City of Louisville, Ky.,
958 F.2d 1354 (6th Cir. 1992) 2, 17-19, 22-24

Bannum, Inc. v. City of St. Charles, Mo.,
2 F.3d 267 (8th Cir. 1993) 2, 17, 19, 20-22, 25

City of Cleburne, Tex. v. Cleburne Living
Center, 473 U.S. 432 (1985) . . . 2, 14-19, 20, 22, 24, 26-28

Gregory v. Ashcroft,
501 U.S. 452 (1991) 21

Village of Euclid, Ohio v. Ambler Realty
Co., 272 U.S. 365 (1926) 15

Ordinances

Tulsa, Ok., Rev. Ordinances ch. 16,
tit. 42, § 101.A 11

Treatises

Robert M. Anderson, *American Law of Zoning*, § 19.01 at 360 (2d ed. 1977) 25

In The Supreme Court of the United States

OCTOBER TERM, 1994

FREEDOM RANCH, INC.,
Petitioner,

v.

BOARD OF ADJUSTMENT OF THE CITY OF TULSA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Appeals

BRIEF IN OPPOSITION

Respondent Board of Adjustment of the City of Tulsa and Respondent Twenty First Properties, Inc. submit this joint brief in opposition to the Petition for Writ of Certiorari of Petitioner, and respectfully request that the Petition for Writ of Certiorari be denied.

SUMMARY OF ARGUMENT

Freedom Ranch asserts in its Petition for Writ of Certiorari that the Tulsa zoning ordinances which mandate that a convict pre-release center seek and obtain a special

exception are unconstitutional on their face, and are unconstitutional as applied to Freedom Ranch. Freedom Ranch relies on City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985), Bannum, Inc. v. City of St. Charles, Mo., 2 F.3d 267 (8th Cir. 1993), and Bannum, Inc. v. City of Louisville, Ky., 958 F.2d 1354 (6th Cir. 1992), as authority for its position.

Respondents assert that none of the authority cited by Freedom Ranch holds that the ordinances in question were facially unconstitutional. To the contrary, each respective court applied the general rule that ". . . legislation is presumed to be valid and will be sustained if the classification drawn by statute is rationally related to a legitimate state interest." Cleburne at 440.

In the case at bar, the Oklahoma Court of Appeals applied the authority set forth above and found the Tulsa zoning ordinances to be constitutional on their face and constitutional as applied to Freedom Ranch.

In general, zoning ordinances need not establish perfect classifications, nor predetermine all conceivable variations of general use classifications. There is a rational relationship to the public interest for zoning ordinances to require, upon notice and hearing, site specific review of proposed convict pre-release centers, which may have significant differences in the types of inmates housed, operations conducted, and locations proposed.

In the case at bar, Freedom Ranch commenced operations at the site in question, without the required special

exception: Freedom Ranch's inmates included violent offenders; Freedom Ranch's inmates committed crimes while housed at the facility; and the evidence presented to the Tulsa County District Court established that the Freedom Ranch convict pre-release center was injurious to the neighborhood, violated the spirit and intent of the Tulsa zoning ordinances, and would substantially interfere with achievement of the objectives of the Tulsa Comprehensive Development Plan.

Respondents assert, and the lower courts which have examined this matter concur, that the Tulsa zoning ordinances are constitutional on their face and constitutional as applied to Freedom Ranch.

STATEMENT OF THE CASE AND PROCEEDINGS IN THE COURTS BELOW

The Tulsa zoning ordinances identify and group potential uses of property located within the City of Tulsa as "use units." The Tulsa zoning ordinances specify which use units are permitted by right, and which use units are permitted by special exception, in each of the zoning districts. A "transitional living center" is included within Use Unit 5. Had Freedom Ranch chosen to do so, its property could have been used as a transitional living center as a matter of right. However, Freedom Ranch's use of the subject property as a "convict pre-release center" (as a use included within Use Unit 2) requires the grant of a special exception by the Tulsa Board of Adjustment.

Freedom Ranch made application for, and was issued a zoning clearance permit as a transitional living center (Use

Unit 5). Thereafter, and contrary to the zoning clearance for Use Unit 5, Freedom Ranch operated a convict pre-release center (Use Unit 2) on the property. After a neighbor complained to the City of Tulsa, and after the City of Tulsa investigated the matter, the City of Tulsa zoning enforcement officer gave a notice of violation to Freedom Ranch. Freedom Ranch then appealed its notice of violation to the Tulsa Board of Adjustment, seeking a determination that it used the property as a transitional living center (included within Use Unit 5), or alternatively, that it should be granted a special exception to permit the use of the property as a convict pre-release center (Use Unit 2).

After notice and hearing, the Tulsa Board of Adjustment determined that Freedom Ranch's use of the property was, in fact, a convict pre-release center, and denied the application for special exception. Freedom Ranch then appealed the decisions of the Tulsa Board of Adjustment to the Tulsa County District Court, and after a trial de novo, the Tulsa County District Court affirmed the actions of the Tulsa Board of Adjustment. Freedom Ranch then appealed the decision of the Tulsa County District Court to the Oklahoma Court of Appeals.

The Oklahoma Court of Appeals, in the Application of Freedom Ranch, Inc., 878 P.2d 380 (Okla. Ct. App. 1994), found that under the facts of the case, the Tulsa zoning ordinances, and their application to Freedom Ranch, did not violate the Equal Protection Clause of the United States Constitution. As to the merits of Freedom Ranch's application for a special exception, which would allow its use of the property as a convict pre-release center, the Oklahoma

Court of Appeals held that the facts found by the Tulsa County District Court supported the denial of Freedom Ranch's application.[1]

On July 13, 1994, the Oklahoma Supreme Court denied Freedom Ranch's application for Writ of Certiorari to the Oklahoma Supreme Court.

FACTS

Freedom Ranch's recitation of the facts of the case at bar, set forth in its Petition to this Court for a Writ of Certiorari, omits important facts, and mischaracterizes other facts. The recitation should be corrected and supplemented as follows:

A. The Nature of Freedom Ranch's Operation

(1) Freedom Ranch houses violent criminals. The fact that the residents of Freedom Ranch are convicted felons, still serving their sentences of incarceration, cannot be disputed. Although Freedom Ranch repeatedly infers in its Petition for Writ of Certiorari that it houses only criminals convicted of nonviolent crimes, the evidence presented to the Tulsa County District Court established that the Freedom Ranch inmates include persons convicted of violent crimes. See infra p. 6-7.

---

[1] Freedom Ranch has confined the issues presented in its Petition to this Court for Writ of Certiorari to the question of whether the Tulsa zoning ordinances violate the Equal Protection Clause.

Freedom Ranch has consistently chosen to use its own definition of "nonviolent," and such definition is misleading and different from that which is commonly intended and understood. For purposes of determining which convicts qualify for placement in pre-release centers, the Oklahoma Department of Corrections has established a "nonviolent offender" classification. Based upon the testimony presented to the Tulsa County District Court by Freedom Ranch's director, Mr. King, a "nonviolent offender" for the purposes of the Oklahoma Department of Corrections classification is a person who has had no write-ups, while in prison, for any violent incidents within the two years prior to his placement at the pre-release center. This classification has nothing to do with the nature of the crime that the inmate committed to result in his incarceration.

The Freedom Ranch director, Mr. King, testified before the Tulsa County District Court as follows:

> Q. (On cross examination) In any event, when you say that, you're not certifying to the Court are you, sir, that as we stand here and you sit there today that there's not a violent offender down there at Freedom Ranch, are you?
>
> A. (by Mr. King) No, sir.

Q. Couldn't there be?

A. You bet.

(Tr. Vol. II, 92).

The facts established that Freedom Ranch inmates include persons convicted of robbery, burglary, second degree rape and grand larceny. (Tr. Vol. II, 91). Freedom Ranch's repeated assertions in its Petition for Writ of Certiorari that its facility is a center for nonviolent offenders misstates the record.

(2) Freedom Ranch's operation increases crime in the neighborhood. Throughout these proceedings, Freedom Ranch has attempted to persuade the Court that its operation has no negative impact on crime in its neighborhood. The evidence presented to the Tulsa County District Court, however, does not support Freedom Ranch's assertion.

Freedom Ranch relies on the testimony of a police department witness that Freedom Ranch has not posed any problem in the area with respect to crime. But such conclusion is based upon that witness's examination of calls from Freedom Ranch. It should be noted there is little need for Freedom Ranch to call the Tulsa Police Department to report the behavior of its inmates, since Freedom Ranch is required to report such behavior directly to the Tulsa Community Corrections Center, that is operated by the Oklahoma Department of Corrections. The Tulsa Community Corrections Center is a lock-up facility.

A more accurate measure of the behavior of Freedom Ranch inmates is reflected in the "serious incident reports," filed by Freedom Ranch with the Oklahoma Department of Corrections. For an eight month period in 1991, seventeen (17) such reports were filed, involving 18% of the Freedom Ranch population. This number included reports of escape (6), assault and battery (2), shoplifting (2), and possession of a stolen vehicle (1), among others. (Tr. Vol. II, 60-61).

It should also be noted that whatever the source of calls made to the Tulsa Police Department from the Freedom Ranch neighborhood, the volume of calls is heavy and represents a great deal of police activity in the neighborhood. (Tr. Vol. III, 546, 550).

(3) Freedom Ranch's convict pre-release center (Use Unit 2) is different from uses included within Use Unit 5. Basic to Freedom Ranch's argument in this case is its contention that its operation is similar to a transitional living center, and other group home uses included within Use Unit 5, and permitted by right within the Tulsa Central Business District.[2] Respondents respectfully submit that both the

---

[2] The Tulsa zoning ordinances define a transitional living center to be as follows:

> Transitional Living Center: A community-based residential facility that provides short-term (120 days or less) room and board in a supervised living environment utilizing counseling and rehabilitation services for persons with a history of juvenile delinquency, behavioral disorders, mental illness, alcoholism or drug abuse.

Tulsa Board of Adjustment and the Tulsa County District Court found that Freedom Ranch's convict pre-release center is not a transitional living center. Respondents further submit that the City of Tulsa is within its legislative prerogatives to make the distinction in its zoning ordinances between the different uses of property occasioned by a convict pre-release center and a transitional living center, and to require the issuance of a special exception in the case of a convict pre-release center.

The Freedom Ranch facility consists of 20 efficiency apartment units, twelve of which are used for inmate housing. The present capacity of the Freedom Ranch facility is 60 inmates, but Freedom Ranch has plans to expand its facility to a capacity of 84. Each existing unit contains only 385 square feet. (Tr. Vol. II, 73, 74, 98, 226-227; Tr. Vol. V, 154).

Freedom Ranch's inmates are under 24 hour a day alert supervision. Unauthorized absences are to be reported to the Oklahoma Department of Corrections, and are treated as escapes from a penal institution, subject to criminal prosecution. (Tr. Vol. II, 138, 140-141). In addition to housing inmates, Freedom Ranch conducts, on premise, 500 urine tests a month for nonresident persons who are under the supervision of the United States Probation Office. (Tr. Vol. II, 77-78).

While there may be some similarities between a transitional living center and a convict pre-release center (occupants of a transitional living center customarily have drug or alcohol problems, and some of the inmates at a

convict pre-release center may also have drug or alcohol problems), the evidence presented to the Tulsa County District Court established that the only requirement that a person must meet to become an inmate at a convict pre-release center is that he be a convicted felon. Commission of a violent crime would not disqualify a man from becoming an inmate at the convict pre-release center. (Tr. Vol. II, 56, 89-91).

B. The Issuance of the Zoning Clearance Permit

Freedom Ranch would have this Court believe that it was misled by the City of Tulsa when the City of Tulsa initially issued an occupancy permit to Freedom Ranch as a Use Unit 5 classification. Respondents respectfully submit that Freedom Ranch's application for an occupancy permit, based upon a Use Unit 5 classification, was not innocent. Before making the Use Unit 5 application, Freedom Ranch's director, Mr. King, filed an application with the City of Tulsa, seeking a special exception for a convict pre-release center (Use Unit 2), with regard to a different property. Mr. King's prior application, however, was denied by the City of Tulsa. (Tr. Vol. II, 124-125, 135).

Freedom Ranch also asserts that the City of Tulsa was aware of the nature of the Freedom Ranch operation from its inception. The City of Tulsa zoning clearance officer, who testified before the Tulsa County District Court, established that had Freedom Ranch made a fair disclosure of the nature of its intended use of the property, a Use Unit 5 permit

would not have been issued to Freedom Ranch. (Tr. Vol. IV, 23-27).

C. The Comprehensive Development Plan of the City of Tulsa

Tulsa zoning ordinances mandate that special exceptions will be granted by the Tulsa Board of Adjustment only after a determination that, among other requirements, the proposed use will be in harmony with the spirit and intent of the Tulsa zoning ordinances.

The spirit and intent of the Tulsa zoning ordinances are embodied in Tulsa, Ok., Rev. Ordinances ch. 16, tit. 42, § 101.A, and states as follows:

> This code is enacted for the purposes of promoting the . . . general welfare . . . conserving the value of buildings and encouraging the most appropriate use of land; encouraging the industrial, commercial and residential growth of the community; and promoting the development of the community in accordance with a comprehensive plan. (emphasis added).

Under the Tulsa Comprehensive Development Plan, the subject property is located in Development Opportunity Site 3, and is the area within the Central Business District of the City of Tulsa with the greatest redevelopment potential. The Tulsa Comprehensive Development Plan for

Development Opportunity Site 3 anticipates redevelopment of the area with office and residential uses.

Testimony regarding planning and zoning practice was presented to the Tulsa County District Court by a number of exceptionally well-qualified professionals. The testimony was consistent, well reasoned, and established in substance the following facts:

The City of Tulsa has a major investment in the downtown area, including major urban renewal projects, expressway systems, its civic center facility, and various government facilities. The vitality and redevelopment of the downtown Tulsa area are essential to the social and economic health of the City. (Tr. Vol. IV, 120-123, 198, 239; Vol. V, 7, 239).

The Cathedral Square Area and particularly Development Opportunity Site 3, in which the Freedom Ranch property is located, is the gateway from the southern part of the City of Tulsa to the downtown area, and has significant redevelopment potential. (Tr. Vol. IV, 119, 124, 197, 204; Vol. V, 232-234).

Freedom Ranch's convict pre-release center is injurious to the neighborhood. (Tr. Vol. IV, 132, 217; Vol. V, 16, 241).[3]

---

[3] This evidence is in direct contrast to Freedom Ranch's assertion in its Petition for Writ of Certiorari that it has improved the area in which it is located.

The use of the subject property by Freedom Ranch as a convict pre-release center is not in keeping with the spirit and intent of the Tulsa zoning ordinances. The use of the subject property as a convict pre-release center would frustrate the objectives of the Tulsa Comprehensive Development Plan, and would impair the future redevelopment of an area which is prime for redevelopment and has a substantial potential for downtown revitalization.

Freedom Ranch's operation results in a diminution of property values in the neighborhood, and negatively affects the potential for the redevelopment of neighboring properties. (Tr. Vol. V, 61, 62, 100, 101, 154-156, 160, 161).

Even Freedom Ranch's own appraisal witness, Mr. Terry Ingram, testified that he could not, from comparable sales, identify any trend (up, down, or neutral) of property values in the vicinity of Freedom Ranch (Tr. Vol. II, 315), and, in effect, had no opinion as to whether Freedom Ranch would negatively impact future redevelopment of the area. Mr. Ingram did admit, however, that Freedom Ranch "could" negatively impact the value of adjoining property, if such property were intended to be redeveloped as an apartment project. (Tr. Vol. III, 329).

D. Board of Adjustment Action on Other Applications for Special Exceptions to Permit Convict Pre-release Centers

In its Petition for Writ of Certiorari, Freedom Ranch points to testimony of Mr. Robert Gardner (a Tulsa city land use planner), to the effect that the Tulsa Board of Adjustment

has never approved a special exception for a convict pre-release center. While the citation to the testimony is accurate, reference to it at this time misleads the Court. In fact, the City of Tulsa, within the past year, has approved two different applications for special exception to permit the operation of two (2) separate convict pre-release centers, one containing 285 beds and a second containing 35 beds.

REASONS FOR DENYING THE WRIT

A. The Opinion of the Oklahoma Court of Appeals is in Accord with this Court's Decision in Cleburne

The decision of the Oklahoma Court of Appeals in this case is in keeping with this Court's holding in Cleburne, supra. In Cleburne, the operator of a group home for the mentally retarded applied for and was denied a special use permit by the City of Cleburne. The operator argued that the city's ordinances requiring a special use permit were invalid on their face, and were invalid as applied, because they discriminated against the mentally retarded in violation of their rights under the Equal Protection Clause.

In its analysis of the case, this Court in Cleburne cited the general rule that ". . . legislation is presumed to be valid and will be sustained if the classification drawn by statute is rationally related to a legitimate state interest." Cleburne, 473 U.S. 440. Further, this Court stated that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows states wide latitude . . ., and the Constitution

presumes that even improvident decisions will eventually be rectified by the democratic processes." Cleburne at 440.

This Court in Cleburne also held that mental retardation is not a quasi-suspect classification, calling for a more exacting standard of judicial review than the "rational relationship standard," which is normally accorded economic and social legislation. Id. at 442. Searching the district court record for the rational relationship between the requirement of a special use permit for a home for the mentally retarded, and a legitimate interest of the city, this Court in Cleburne found no supporting facts. Accordingly, this Court held in Cleburne that the city ordinances as applied failed the "rational relationship" test, and were invalid as applied.

The decision of the Oklahoma Court of Appeals in the case at bar is in accord with the Cleburne decision. The Oklahoma Court of Appeals began its analysis with the proposition that municipal zoning ordinances and regulations are presumed valid, citing Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926). Secondly, the court acknowledged that ". . . so long as such zoning ordinances create classifications based not upon a suspect class nor involving fundamental right, such classification need only rationally relate to a legitimate purpose in order to withstand constitutional challenge." Freedom Ranch, 878 P.2d at 382.

Next, the Oklahoma Court of Appeals considered whether the Tulsa zoning ordinances in question create a classification that is based upon a suspect class, or involve a fundamental right, thereby falling outside the purview of the

the general rule. The Oklahoma Court of Appeals concluded as follows:

> . . . In the present case, we deal with neither a suspect class (convict pre-release centers) nor a fundamental right (to operate a convict pre-release center without regard to zoning ordinances). Thus, if there exists a legitimate purpose for requiring convict pre-release centers to obtain a special zoning exception, such treatment is constitutional.

Freedom Ranch at 382.

Finally, and in accord with the decision of this Court in Cleburne, the Oklahoma Court of Appeals reviewed the record to determine whether the City of Tulsa demonstrated that a rational relationship existed between its legitimate city interest and the requirement that a special use permit be obtained for a convict pre-release center.

The Oklahoma Court of Appeals held that the City of Tulsa's denial of Freedom Ranch's application for a special use permit was rationally related to the City's legitimate interest. Id. at 382. The Oklahoma Court of Appeals noted that the evidence submitted at trial (which established that Freedom Ranch housed violent criminals, increased crime in the neighborhood, diminished neighborhood property values and precluded the accomplishment of the City's Comprehensive Development Plan) required the conclusion that the Tulsa zoning ordinances, and their application to Freedom Ranch, are constitutional. Id.

B. The Decisions of the United States Circuit Courts of Appeal are Consistent in their Application of the Principles of Cleburne

Freedom Ranch asserts that because two United States Circuit Courts of Appeal have reached different conclusions regarding the constitutionality of the ordinances that they reviewed, "the Courts of Appeal are divided concerning the application to halfway houses of this Court's analysis in Cleburne."

Respondents respectfully disagree with Freedom Ranch's assertions. The circuit courts in both Bannum, Inc. v. City of Louisville, Ky., 958 F.2d 1354 (6th Cir. 1992), and Bannum, Inc. v. City of St. Charles, Mo., 2 F.3d 267 (8th Cir. 1993), analyzed the facts presented in light of the Cleburne ruling. Consistent with its analysis of Cleburne, the court in Louisville held that the ordinances were unconstitutional as applied, while the court in St. Charles found that the ordinances were constitutional as applied to the case presented for review. Neither court however, held that the ordinances in question were facially unconstitutional.

In Louisville city zoning ordinances required a conditional use permit for community treatment centers for felony offenders. No conditional use permit was required for boarding houses or certain other types of group homes. Bannum proposed to operate a community treatment center, housing 24 persons not convicted of crimes of violence. Rather than apply for a conditional use permit, Bannum brought an action against the city in federal district court,

alleging that the ordinances treated its operations differently from other group homes, and were therefore unconstitutional.

In accord with this Court's analysis in Cleburne, the federal district court, and subsequently the United States Court of Appeals for the Sixth Circuit, reasoned that there must be a rational relationship between the different treatment afforded by the ordinances, and a legitimate state interest, in order for the ordinances to pass constitutional muster. In Louisville, the city presented one primary justification for the different treatment afforded the community training center: such centers present a threat to the community in which they operate, because their residents are more likely to commit crimes than are persons who have never been convicted of a crime.

Searching the trial court record, the United States Court of Appeals for the Sixth Circuit found no evidence to support the city's position. Finding that the city failed to establish the required rational relationship, the Sixth Circuit held that the Louisville ordinances were unconstitutional only as applied to the plaintiff. Louisville, 958 F.2d at 1361. Notably, the court went on to say that it was not necessary for the court to declare the ordinances invalid, as the city may well have a legitimate interest in requiring a conditional use permit for an institution housing those with a prior record of violent offenses. Id. at 1361. The court also declined to hold that the city could never require a conditional use permit for group home uses, by stating:

> As the district court recognized in its January 1989 ruling, the City may well have a

> legitimate interest in requiring a conditional use permit of an institution housing those with a prior record of violent felony offenses. We do not hold that the City may never require a conditional use permit for group home uses.

Id.

The posture of the Louisville case as presented to the Sixth Circuit is noteworthy. The federal district court had found, based upon the evidence presented at trial, that the ordinances were unconstitutional as applied to the plaintiff. The circuit court's review was limited to a determination of whether the trial court had clearly erred in its decision.

The United States Court of Appeals for the Eighth Circuit in St. Charles scrutinized the ordinances in question, in light of this Court's holding in Cleburne. The case of St. Charles, however, came to the United States Court of Appeals for the Eighth Circuit in a different posture from that of Louisville. In St. Charles, the federal district court had held the zoning ordinances constitutional as applied.

The zoning ordinances in the St. Charles case required "half-way houses" (facilities for rehabilitation of prisoners, former prisoners, or juvenile offenders) to obtain conditional use permits from the city, while hotels, convalescent homes, hospitals, apartment buildings and multiple family housing units were permitted as a matter of right in certain zoning districts. Again, rather than apply for a conditional use permit for its community treatment center, the plaintiff filed a complaint against the city in federal district court. The

plaintiff claimed that the city violated its rights under the Equal Protection Clause of the Constitution by requiring it to apply for a permit, while not requiring other group homes to make such an application.

Applying the rational relationship test utilized in Cleburne, the United States Court of Appeals for the Eighth Circuit found that the St. Charles' ordinances which required conditional use permits for half-way houses were rationally related to the legitimate state interest of the safety and welfare of its public. St. Charles, 2 F.3d at 272-73. Because half-way houses, as defined by the ordinances, could include facilities for persons convicted of violent crimes or rape, the city had a legitimate interest in controlling the location of such facilities to promote the public welfare. Id. at 272-73.

The United States Court of Appeals for the Eighth Circuit reasoned that the concerns of the city under the circumstances of Cleburne were different from the concerns in St. Charles. The city's requirements in Cleburne would be irrational as applied to any home for the mentally retarded, whereas in St. Charles, the classification contained in the ordinances was addressed to half-way houses which could serve violent offenders. The Court went on to state as follows:

> . . .The City could rationally believe that some groups in this classification could pose a threat to the public welfare. Such concerns are not based on irrational prejudice, but rather on a realistic view that some members of these groups could pose a threat in some locations.

> It is not irrational for the City to believe that recidivism could be a problem with some person served by half-way houses. This is a legitimate concern which can be addressed on a case-by-case basis through application for conditional permits.

Id. at 272.

Finding that a rational relationship existed between the requirement of a conditional use permit for the operation of a half-way house, and the legitimate state concerns for public welfare, the United States Court of Appeals for the Eighth Circuit held in St. Charles that the ordinances were constitutionally firm on their face. Id. at 271. The appellate court further found that it was not arbitrary or irrational for the city to create a broad category ("half-way houses") in its ordinances, and then draw fine lines between different types of half-way houses when an application for a permit is submitted. Id. at 273. The Eighth Circuit concluded that the ordinances were constitutional as applied. Id.[4] The circuit court left to the regulatory body the job of scrutinizing the

---

[4] The Eighth Circuit cites this Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), stating that the city does not violate the Equal Protection Clause just because the classifications contained in its ordinances are not perfect. The zoning ordinance, the Court states, was not drafted just to apply to the application under consideration, but to any halfway house which houses prisoners, former prisoners or juvenile offenders. The same can be said of the Tulsa ordinances, which create broad categories allowing for distinctions to be made in connection with each application.

particular facts of the application, and the propriety of a particular location.

In summary, the courts in both Louisville and St. Charles followed this Court's analysis in Cleburne. Each court confirmed the decision presented for review. Neither court concluded that the ordinances under review were facially unconstitutional. Each court recognized that state interests may be advanced by requiring conditional use permits for facilities housing persons convicted of violent crimes. The decisions are not inconsistent with each other, and are not inconsistent with this Court's ruling in Cleburne.

C. The Freedom Ranch Case would be Decided the Same in Both the Sixth and Eighth Circuits

Freedom Ranch claims, "[t]here can be no doubt that the present case would have been decided the opposite way if it had come before the Sixth Circuit." (Page 10 of its Petition to this Court for a Writ of Certiorari). Respondents respectfully disagree.

In the Louisville case, there was no evidence presented with regard to the effect that the proposed community treatment center would have on the value of neighboring properties. In addition, there was no evidence presented with regard to the impact that the proposed use would have on achieving the objective of a comprehensive development plan. In the instant case, credible evidence was submitted concerning the decline in the value of neighboring properties, and the negative impact that the existence of

Freedom Ranch would have on the accomplishment of Tulsa's Comprehensive Development Plan.

Further, the proposed community treatment center in Louisville did not house felons convicted of crimes of violence, crimes involving firearms or sexual offenders. The evidence presented in the instant case clearly distinguishes from Louisville that Freedom Ranch's population did include inmates convicted of crimes involving robbery, burglary, second degree rape and grand larceny. The evidence also showed that, while residing at Freedom Ranch, inmates continued to commit crimes. During an eight month period for which statistics were available, nearly 20% of the Freedom Ranch population was involved in incidents sufficiently serious to report the occurrences to the Oklahoma Department of Corrections. With that track record, one can only wonder what the future holds if some form of zoning review is not required.

The United States Court of Appeals for the Sixth Circuit in Louisville did not find the Louisville ordinances that required a conditional use permit invalid on their face. Rather, the court found as follows:

> As the district court recognized in its January 1989 ruling, the City may well have a legitimate interest in requiring a conditional use permit of an institution housing those with a prior record of violent felony offenses. We

> do not hold that the City may never require a conditional use permit for group home uses.

Louisville, 958 F.2d at 1361.

Contrary to Freedom Ranch's argument, it is respectfully submitted that both the Sixth and Eighth Circuits would find, based on the facts of this case, that a conditional use permit requirement for the Freedom Ranch operation does not violate the Equal Protection Clause.[5]

D. There are No Special Reasons for this Court to Grant a Writ of Certiorari in this Case.

Special exception procedures are an accepted and well established part of zoning administration. Special exception procedures are designed to provide practical flexibility, to control land uses which are especially troublesome, and to soften the impact of certain uses upon areas where they will be incompatible unless conditioned in a manner suitable to a

---

[5] Freedom Ranch refers to the Eleventh Circuit case of Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989 (11th Cir. 1990). Because of the posture of the case, the circuit court did not rule on the constitutionality of the zoning ordinances under review. The case was remanded to the federal district court for determination of the constitutional validity of the ordinances, with the recommendation that the district court's decision include an analysis of Cleburne. It is interesting to note that the residents of the treatment center in the Fort Lauderdale case were men convicted of white collar crime. Freedom Ranch's conclusion that the case at bar would be decided differently in the Eleventh Circuit is not supportable.

particular location. Robert M. Anderson, *American Law of Zoning*, § 19.01 at 360 (2d ed. 1977).

By means of the special exception process, a use which would ordinarily fall within a broadly defined category (residential, commercial, industrial) but which has characteristics that may be incompatible with some uses of such classifications, may be maintained in certain other districts, pursuant to a special exception permit approved by the Board of Adjustment after notice, hearing and compliance with prescribed standards. Anderson, § 19.01 at 359.

It is a rational exercise of legislative authority for the City of Tulsa to find that convict pre-release centers, as well as jails, cemeteries, bus stations, post offices and other nontypical uses, should be subject to special exception review by the Tulsa Board of Adjustment, and that the Tulsa zoning ordinances establish the standards to be met in order for the Tulsa Board of Adjustment to approve the special exception use.

Similarly, the City of Tulsa may legislatively determine that transitional living centers should be classified in a different category from convict pre-release centers, and that the particular characteristics of a transitional living center would not require that a special exception requirement be imposed. The City of Tulsa does not violate the Equal Protection Clause just because the classifications contained in the Tulsa zoning ordinances are not perfect. As stated by the court in St. Charles, ". . . we need inquire only whether 'any state of facts reasonably may be conceived to justify' the

classification of half-way houses as conditional uses. . . ." (citation omitted).

As social circumstances change, and as various types of land use evolve to meet social needs, a zoning ordinance may need to be amended to deal with such uses, the scale and nature of which may not have been previously foreseen. This is what actually occurred in the City of Tulsa, following the completion of the Freedom Ranch proceeding. After the completion of the Freedom Ranch proceeding, the Tulsa zoning ordinances were amended to require that even a transitional living center must seek a special exception permit. The amendment does not establish that the previous ordinance was unconstitutional, or that a transitional living center is the same as a convict pre-release center, but rather confirms that the City of Tulsa has the ability to exercise its legislative prerogatives, and to more effectively regulate the uses of property within the limits of the City. The amendment also confirms that neither a convict pre-release center nor a transitional living center are necessarily an appropriate use at all locations within the Central Business District of the City of Tulsa.

Freedom Ranch raised its constitutional challenge to the Tulsa zoning ordinances early in this proceeding. Both the Tulsa County District Court and the Oklahoma Court of Appeals have carefully analyzed the legal precedents, including the Cleburne decision, to measure the Tulsa zoning ordinances against such precedent. Both courts have examined the evidence concerning the true nature of Freedom Ranch's operation and effect. Both courts have found that the City of Tulsa had a legitimate interest which was

rationally related to the requirement that Freedom Ranch apply for and receive a special exception for the operation of a convict pre-release center in the Central Business District of the City of Tulsa. Both courts have found that the City of Tulsa's denial of the special exception is supported by the facts of this case.

The procedures established by the Tulsa zoning ordinances, together with the established legal precedent, are sufficient guidance for the selection of appropriate sites within the Tulsa community for the location of convict pre-release centers.

The overcrowded nature of the nation's prisons and the possible use of convict pre-release centers to relieve such overcrowding, is not a sufficient reason to grant certiorari in this case. Municipal zoning authorities, guided by the legal precedent of Cleburne and related decisions, should be permitted to formulate ordinances that protect the public interest and provide a practical means for the regulation and location of convict pre-release centers and similar uses.

CONCLUSION

Further review of this case is not warranted. The decisions of the circuit courts of appeal are consistent with the Cleburne decision. The Oklahoma Court of Appeals was correct with regard to its analysis of the constitutional validity of the Tulsa zoning ordinances, and the principles set

forth in Cleburne. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

Alan L. Jackere
Assistant City Attorney
City of Tulsa
200 Civic Center, #316
Tulsa, OK 74103
(918) 596-7717

Attorney for Respondent
Board of Adjustment of
the City of Tulsa

Thomas P. Nally *
Nichols, Wolfe, Stamper, Nally,
Fallis & Robertson, Inc.
124 East Fourth St., Suite 400
Tulsa, OK 74103-5010
(918) 584-5182
*Counsel of Record

Roy D. Johnsen
Janine H. VanValkenburgh
Epperson & Johnsen
201 West Fifth St., Suite 440
Tulsa, OK 74103-4211
(918) 585-5641

Attorneys for Respondent
Twenty First Properties, Inc.